83-1129

Office - Supreme Court, U.S.
FILED
JAN 7 1984
ALEXANDER L. STEVAS,
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

-vs-

ANTONIO CIAMMITTI AND
SABATINO CIAMMITTI
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER 18 USC § 3109 IS VIOLATED WHEN ELEVEN ARMED LAW ENFORCEMENT OFFICIALS, EXECUTING A SEARCH WARRANT, WAIT MERELY FIFTEEN TO THIRTY SECONDS BEFORE BATTERING DOWN THE DOOR OF A DARKENED SLEEPING RESIDENCE AT 12:15 A.M. WHEN NO EXIGENT CIRCUMSTANCES EXISTED TO JUSTIFY THE BREAKING.

II. WHETHER STATEMENTS CONTAINED IN A SEARCH WARRANT AFFIDAVIT RECITING THAT THE AFFIANT "OBSERVED" PETITIONERS IN POSSESSION OF CERTAIN SPECIFIC CHEMICALS ARE FALSE WITHIN THE MEANING OF *FRANKS v DELAWARE*, WHEN IN FACT AFFIANT HAD NOT OBSERVED THE ITEMS, BUT HAD INSTEAD RELIED UPON INVOICES AND AN INFORMANT'S DECLARATIONS AS THE BASIS FOR THE STATEMENT, BUT FAILED TO INFORM THE ISSUING MAGISTRATE OF HIS RELIANCE ON THIS HEARSAY.

III. WHETHER FEDERAL RULE OF CRIMINAL PROCEDURE 48(b) PROVIDES PROCEDURAL SAFEGUARDS BEYOND THOSE ALREADY EMBODIED IN THE FIFTH AND SIXTH AMENDMENT AND CAN APPLY TO THE PERIOD OF TIME BETWEEN DISMISSAL OF CHARGES AND SUBSEQUENT REINDICTMENT ON THE SAME CHARGES TWENTY-SEVEN MONTHS AFTER PETITIONERS' ORIGINAL ARREST.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	24
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	PAGE
Aguilar v Texas, 378 US 168 (1964)	15, 17
Barker v Wingo, 407 US 514 (1972)	20, 22, 23
Franks v Delaware, 438 US 154 (1978)	4, 5, 13, 14, 15, 16, 17
Illinois v Gates, ____ US ____ (June 8, 1983)	16, 17, 15a
Jones v United States, 362 US 257 (1960)	16
Ker v California, 374 US 23 (1963)	8
Mathies v United States, 374 F2d 312 (1967)	20, 21
Miller v United States, 357 US 1 (1958)	7, 8, 9, 11, 12, 23, 10a, 15a, 16a, 17a, 11b
Moore v Arizona, 414 US 25 (1973)	22, 23
Sabbath v United States, 391 US 585 (1968)	8, 9
Scheckloth v Bustamonte, 412 US 218 (1973)	9
Semaynes Case, 5 Coke 91, 11 ERC 629, 77 Eng Reprint 195 (1603)	8, 9
Spinnelli v United States, 393 US 410 (1969)	15, 17
United States v Brown, 520 F2d 1106 (D.C. Cir. 1975)	23
United States v Bustamonte-Gamez, 488 F2d 4 (1973)	12, 11b
United States v Di-Re, 332 US 581 (1947)	11, 16a
United States v Dreyer, 533 F2d 112 (1976)	23

PAGE

United States v Fahey, 514 F2d 1098 (2nd Cir. 1975) 19

United States v Jasper, 331 F Supp 814 (E.D. Pa 1971), *vacated* 460, 1224 (3rd Cir. 1972) 19

United States v Judge, 425 F Supp 499 (D. Mass. 1976) 21, 23

United States v Lovasco, 431 US 783 (1977) 20, 26

United States v MacDonald, 456 US 1 (1982) 18, 20, 21, 22, 4b

United States v Marion, 404 US 307 (1971) 19, 2b, 4b

United States v Mark II Electronics, 283 F Supp. 280 (E.D. La 1968) 19

United States v McLemore, 477 F Supp 1229 (E.D. Mich 1978) 20, 22

United States v Salzmann, 417 F Supp 1139 (E.D. N.Y. 1976) 21

United States v Starr, 434 F Supp 214 (D.C. 1977) . 19

United States v Ventresca, 380 US 102 (1965) 14

STATUTORY AUTHORITIES

18 USC § 3109 ..... i, 2, 4

21 USC § 841(a)(1) 1

21 USC § 846 4

Fed. R. Cr. Proc. 48(b) 5

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Antonio and Sabatino Ciammitti, by and through their attorneys, Neil H. Fink and Richard Lustig, petition herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the lower court's judgment of conviction for violations of 21 USC 846, conspiracy to manufacture methamphetamine.

OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals filed November 7, 1983, affirming the District Court's finding of guilt is reprinted in full as Appendix A hereto. That opinion has not, as of this writing, been published.

JURISDICTION

The Opinion and Order appealed from was filed November 7, 1983. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

I. Fed R. Cr. Proc. 48(b)

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial the court may dismiss the indictment, information or complaint.

II. 18 USC § 3109

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT OF THE CASE

On January 18, 1980, at 12:15 a.m. approximately eight DEA agents and three local police officers descended upon the home of Petitioners to execute a search warrant. As found by District Court Judge DeMascio, the pertinent facts are as follows. The only light in the house visible from the outside was a light shining through a basement window on the right side of the house. Nora Ciammitti was sitting in the family room, her husband Antonio Ciammitti was not home, and her four children were asleep in their bedrooms. Petitioner Sabatino Ciammitti was in the basement. Most agents approached the house from the front door although several were assigned to the back and sides. Agent Thomas Powell pounded loudly on the front door, and yelled that they were federal agents with a search warrant who wanted to be admitted. After pounding on the door for approximately 15 to 30 seconds without receiving a response, agents started to break the door down with a battering ram. At about the same time, agents stationed at the right side of the house heard noise in the basement, broke in the basement window, and pulled their guns on Petitioner Sabatino Ciammitti whom they saw through the window.

Nora Ciammitti approached the front door after hearing the noise outside. Once the agents with the battering ram had broken a hole through the door, Agent Minger was able to see Nora Ciammitti standing inside the door. Ms. Minger told the other agents what she saw and persuaded them to stop battering the door. The agents then identified themselves as federal agents with a search warrant and demanded that Nora Ciammitti open the door.

After encountering some difficulty unhooking the latch, she opened the door and admitted the agents. The agents remained at the house for several hours; all agents who entered the

house did so through the front door. The agents arrested Sabatino Ciammitti in the basement where they found a laboratory being used for the manufacture of methamphetamines. While inside the house, agents used a crowbar to open the unlocked door from the kitchen to the garage, breaking the lock. Two agents may have been unnecessarily destructive in their search of the basement. The three oldest children (who were awakened by the pounding on the front door) and Nora Ciammitti were confined to the family room through the search. Appendix B.

Later that same day Petitioners were arrested and appeared before U.S. Magistrate Thomas Carlson on a complaint charging them with conspiracy to manufacture controlled substances. This complaint was subsequently dismissed on March 21, 1980 by U.S. Magistrate Barbara Hackett for "no progress".

Months went by and gradually the tension of the unresolved charges began exacting a heavy toll on the Petitioners and their families. During this period of time the government conducted little, if any, investigation. Finally, over two years later, on April 15, 1982, the Grand Jury returned an indictment against Petitioners charging them with violations of 21 USC §§ 846, 841(a)(1) and 18 USC §§ 2 and 1952. In all a total of *twenty-seven* months had elapsed between Petitioners' arrest and their indictment.

Petitioners challenged the veracity of statements made in three separate paragraphs of the search warrant executed at his home pursuant to *Franks v Delaware*. See Appendix C for challenged paragraphs.

Petitioners asserted that the challenged statements were false because Petitioners positively avered, by affidavit, that on all three occasions the chemicals and laboratory equipment seized were packaged in such a manner that the affiant could not possibly have known from observation what was in them.

Special Agent Powell, affiant of the warrant here in issue, admitted during cross-examination that the packages, which included chemicals and equipment to be delivered to Defendants on December 11 and December 23, 1979 and January 14, 1980, were closed at the time they were delivered to defendants, and thus, that he could not see what chemicals were in the packages at the time of delivery. Special Agent Powell further testified during cross-examination that he did not base the statements in his affidavit solely on his personal observations, but also based them on his conversations with Richard Hall, who was later identified as a government informant, and on invoices supplied to him by Hall.

Petitioners were found guilty by the Honorable District Court Judge, sitting without a jury, of the Count I conspiracy when they agreed with the government to try the case on a stipulated set of facts.

On appeal, the Sixth Circuit Court of Appeals per Judge Lively held Petitioners were not entitled to dismissal pursuant to Fed. R. Cr. Proc. 48(b); that no *Franks* violation had been shown and that § 3109 had not been violated. With respect to the § 3109 issue Judge Jones offered a strong and persuasive dissent.

REASONS FOR GRANTING THE WRIT

I

WHETHER 18 USC §3109 IS VIOLATED WHEN LAW ENFORCEMENT OFFICIALS EXECUTING A SEARCH WARRANT WAIT MERELY FIFTEEN TO THIRTY SECONDS BEFORE BATTERING A HOLE IN THE DOOR OF A SLEEPING RESIDENCE AT 12:15 A.M. WHEN NO EXIGENT CIRCUMSTANCES EXIST TO JUSTIFY THE BREAKING.

On the morning of January 18, 1980 at 12:15 a.m., eleven DEA agents accompanied by three local police officers approached petitioners' darkened, sleeping home. The only light in the residence came from the basement. As the district court viewed the events:

> Most agents approached the house from the front door, although several were assigned to the back and sides. Agent Powell pounded loudly on the front door, and yelled that they were federal agents with a search warrant who wanted to be admitted. After pounding on the door for approximately 15 to 30 second[s] without receiving a response, agents started to break the door down with a battering ram. At about the same time, agents stationed at the right side of the house heard noise in the basement, broke in the basement window, and pulled their guns on Sabatino Ciammitti whom they saw through the window. Appendix A at 9. The court below held no violation of §3109[1] had occurred in the execution of the search warrant.

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[1] 18 USC §3109 provides:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein to execute a search warrant, if, after notice his authority and purpose, he is *refused* admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. (Emphasis not in original)

The decision of the court below significantly undermines centuries old and jealously preserved privacy interests. Left undisturbed the decision would severly denigrate precious protections implicit in the Fourth Amendment and would work to authorize unnecessary invasions of the home. The decision runs contrary to both the clear intent of 18 USC §3109 and longstanding policies inherent in Fourth Amendment jurisprudence.

In ruling as it has, the Sixth Circuit has either misread or done a grave injustice to this Court's decision in *Miller v United States*, 357 US 1 (1958). The court below merely distinguished the case upon its facts without examining the clearly analagous rationale of that opinion. *Miller* reversed a federal narcotics conviction based upon the illegal seizure of evidence obtained in an unlawful forced entry into a house by police officers without a search warrant and without first informing the occupants of their purpose for demanding admission. Petitioners do not pretend to offer *Miller* as a case factually on all fours with the present one. However, the opinion does speak at great length to both the historical basis of Fourth Amendment jurisprudence as well as to the interrelation of the Amendment to 18 USC §3109. As Judge Jones most persuasively dissented below, "I deem *Miller's* legal import to be entitled to far greater weight than the majority is able to lend." Appendix A at 15.

"From the earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest. Such action invades the precious interest in privacy summed up in the ancient addage that a man's house is his castle." *Miller, supra* at 306-307.

> The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may

not enter — all of his forces dares not cross the threshold of the ruined tenement. *Id*, quoting remarks attributed to William Pitt, Earl of Chatham on the occasion of a 16th Century debate in Parliament.

History, as well as the precedents of this Court clearly indicate judicial respect for the sanctity of the home. The privacy interest an individual has in his "castle" cannot be lightly swept aside. Sanctity of the home, however, is not an absolute bar to forced entry under appropriate circumstances. Common law vested some authority in law enforcement officers to forcibly enter a dwelling to effect law enforcement objectives. *See, Ker v California*, 374 US 23 (1963). While common law authorities of that long ago day disagreed as to what circumstances would justify such intrusions, on one point they did agree; the breaking was unlawful where the officer first failed to state his authority and purpose for demanding admission.

> In all cases where the King is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, *if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors.* (Partial emphasis in original) *Miller, supra* at 308, quoting from *Semayne's Case*, 5 Coke 91, 11 ERC 629, 77 Eng. Reprint 195 (1603).

"The requirement stated in *Semayne's Case* still obtains. It is reflected in 18 USC 3109," *Id*, as a codification of tradition long embedded in Anglo-American law. *Sabbath v United States*, 391 US 585 (1968). "The rule seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission." *Miller, supra* at 309. As Justice Marshall has declared, the requirement is, "deeply rooted in our heritage and should not be given grudging application." *Sabbath, supra* at 589.

The court below cannot be found guilty of giving the requirement 'grudging application'; more correctly it could be said the court effectively gave the requirement *no* application. To allow announcement alone to satisfy the rule is to render the protection of §3109 non-existent. As a codified reflection of the "reverence of the law for the individual's right of privacy in his house," *Miller, supra* at 313, §3109 cannot be read to allow forced entries without first giving occupants an opportunity to comply with an official demand for admission. The Court below failed to recognize this.

There the Court sanctioned the very activity which the common law, *Semayne's Case, supra* and this Court, *Miller, supra* and *Sabbath, supra* have long decried. It cannot be overstated that no exigent circumstances were evinced to warrant the blatently intrusive police activity here in dispute. Further, that the agents ceased breaking the door with a battering ram when Mrs. Ciammitti came upon the scene is of no significance here. Surely no reasonable person would suggest she consented to the search inasmuch as the agents had already battered a hole in the door *before* she arrived. *See, Schneckloth v Bustamonte*, 412 US 218 (1973). The damage was done, §3109 was flouted when, before allowing sufficient time to answer the entry demand, the battering ram first struck the door in an overt attempt to break it down. Certainly, it was then that 'the King, with all his force dared to cross the threshold of the ruined tenement.' *Miller, supra,* at 307. It was then the protections implicit in the rule were eviscerated. Hence, the actions should be viewed as impermissible under common law and as violative of §3109.

A second infirmity in the Circuit Court's treatment of this issue can be found in the following unreasoned, conclusory language of the opinion. "Given the knowledge that they had of the activities in the basement, we find the agents were justified in concluding their summons was being ignored.

Thus, we conclude there was no violation of §3109." Appendix A at 11.

Petitioners contend that such language is inconsistent with the intent of §3109. The majority seems to be condoning the overly zealous practices displayed by the DEA agents based upon the 'knowledge they had of the activities in the basement.' Obviously the agents had some basis upon which to believe illegal activity was afoot prior to their arrival at the search site. Otherwise, the search warrant under which they acted would not have issued. But such knowledge, without more, does not give law enforcement officials authority to wantonly destroy property. By its very language the statute authorizes breaking only when admittance is refused. Petitioners concede it could also be applied when a call for entry is merely ignored. In the present case, however, no evidence whatsoever was adduced to indicate the agents acted pursuant to perceived exigencies. At the very least then, the officers should have waited long enough to allow occupants time to heed their demand for admission. This, however, they failed to do. At 12:15 a.m., at a house in which no one appeared awake save for the known and carefully observed activity in the basement, fifteen to thirty seconds cannot be construed as a reasonable length of time for someone to comply with the demand for entry. The fifteen to thirty seconds allowed would be insufficient for the individual in the basement to comply, as well as insufficient for other occupants, possibly asleep or in some distant corner of the home to apprise themselves of the significance of the situation and to comply with the agents' entry demand. As Judge Jones correctly opined in his dissent below,

> I am unable to believe that it was reasonable to expect... that any individual could have, or *would have*, unlocked the front door at 12:15 in the morning to a group of yelling and pounding strangers — and do so

within one half of one minute. Certainly no reasonable law enforcement agent should have sensibly expected that a fifteen to thirty second delay in answering the door at that hour constituted a denial of admittance. (emphasis in original) Appendix A at 13.

A further deficiency in the reasoning below lies in the apparent pleasure with which the majority notes that extensive preliminary investigative work went into the search and resulting seizure of drug related evidence here at issue. The tone of the majority's opinion frighteningly resounds of the thinking that 'the ends justify the means'. Such result oriented thinking is blatantly contrary to American jurisprudence. *Miller v United States*, *supra*, again becomes instructive. There this Court declared:

> We have had frequent occasion to point out that a search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success. *Miller, supra* at 312, quoting *United States v Di Re*, 332 US 581, 585 (1947).

The logic of this position defies debate. To permit results to legitimize methods would abrogate the very procedural safeguards the Constitution, federal and state laws were designed to protect.

Petitioners contend that to allow law enforcement personnel to comply with the 'announce' requirement of *Miller* without further requiring such officials to refrain from invading a home for a period sufficient to reasonably allow compliance with their demand of entry is to denude §3109 of all meaning. However, this is precisely the interpretation the statute has received below.

With this evil in mind, the Ninth Circuit in *United States v Bustamonte-Gamez*, 488 F2d 4, 12 (1973) offered the following standards for determining under what circumstances 'refusal

of admittance' following a proper §3109 announcement has occurred:

> . . . entry is permissible simultaneously with or shortly after announcement if there is a likelihood that the occupants will attempt to escape, resist, destroy evidence, or harm someone within *and* if a nonforcible entry is possible; more specific inferences of exigency are necessary if entry may be obtained only by the physical destruction of property; and explicit refusal of admittance or lapse of a significant amount of time is necessary if the officers have no facts indicating exigency.

Judged by these standards, entry upon announcement only would not have been permissible under the facts here presented. Forced entry was attempted and specific inferences of exigency simply did not exist to warrant battering down the door.

This Honorable Court stands as the bulwark against the regressive judicial lawmaking exhibited below. It is upon that footing Petitioners here seek review of that decision. The language of Mr. Justice Brennan writing for this Court in *Miller*, *supra* at 313 cries out as reason to halt the erosion of centuries of old precedent the court below ignores:

> Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

II

WHETHER STATEMENTS MADE IN A SEARCH WARRANT AFFIDAVIT THAT THE AFFIANT "OBSERVED" PETITIONERS IN POSSESSION OF CERTAIN SPECIFIC CHEMICALS ARE FALSE WITHIN THE MEANING OF *FRANKS V. DELAWARE*, WHEN IN FACT AFFIANT DID NOT OBSERVE THE ITEMS, BUT INSTEAD RELIED UPON INVOICES AND AN INFORMANT'S DECLARATION AS THE BASIS FOR THE STATEMENT, BUT FAILED TO INFORM THE ISSUING MAGISTRATE OF HIS RELIANCE OF THIS HEARSAY.

Franks v Delaware, 438 US 154 (1978) conferred upon criminal defendants the right to challenge the veracity of statements contained in a search warrant application. There the Court held that, following the prescribed procedural requirements, if it is found that the affiant made a false statement knowingly or intentionally, or in reckless disregard of the truth, the false statement must be excised from the affidavit and the document must then be reexamined to determine if the remaining assertions provide sufficient information for a finding of probable cause. If, after the false statements are removed probable cause is lacking, the search warrant is invalid and all evidence seized pursuant to that warrant must be suppressed.

In the present case, pursuant to a search warrant, DEA agents searched Petitioners' residence and seized drug paraphenalia, later introduced into evidence against them. Petitioners contend, however, that DEA Special Agent Thomas Powell, affiant of the search warrant here in dispute, made three patently false statements in the course of his affidavit which were crucial to a determination of probable cause. Agent Powell's affidavit declared in three separate

paragraphs (numbers 2, 6 and 7, see Appendix C) that *he* "*observed*" certain specific chemicals and/or laboratory equipment being delivered to and in the possession of Petitioners. If believed, these paragraphs were essential to a finding of probable cause because they were the only paragraphs placing chemicals in the possession of Petitioners and because the specific chemicals listed are known to be used in manufacture of controlled substances.

In fact, however, Agent Powell could not actually have "observed" Petitioners in possession of the chemicals or laboratory equipment because at the time of their delivery, they were packaged in closed cartons. During the course of the District Court hearing granted upon Petitioners' assertion of a *Franks* violation, Agent Powell testified that his statements (i.e. his "observations") were in truth motivated by observations of the chemicals made prior to their delivery, from hearsay discussions with Richard Hall, later identified as a paid government informant, and by a review of invoices provided by the firm that supplied the chemicals. Thus, by his own testimony, Agent Powell conceded he did not actually see what was delivered to Petitioner. He simply inferred the cartons contained chemicals and drug related material. That this was merely an inference was *not* conveyed in his affidavit.

The court below partially rationalized its finding of no *Franks* violation based upon the knowledge that, "the search warrant was drafted in 'the midst and haste of a criminal investigation,'" citing, *United States v Ventresca*, 380 US 102, 108 (1965). Although appreciative of both the time constraints law enforcement officials are often forced to work under and the need for prompt action in certain situations, Petitioners contend that expediency simply cannot excuse the making of patently false statements in a search warrant affidavit. As Justice Goldberg so correctly admonished, "[A]n evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed

and deliberate determinations of magistrates empowered to issue warrants. . . are to be preferred over the hurried actions of officers,. . . who may happen to make arrests." *Aguilar v Texas*, 378 US 108, 110-11 (1964), quoting from *United States v Lefkowitz*, 285 US 452 (1931).

The Circuit Court also found comfort in the thought that Agents Powell's choice of language was merely "imprecise". Petitioners point out however that the Circuit Court acknowledged that a fuller, more detailed recitation of the actual source of the Agent Powell's information would have been desirable. That notwithstanding, the court found the agent's statements comported with the requirements of *Franks*.

Petitioners' contend however that by sweeping aside Agent Powell's choice of the word "observed" as merely "imprecise" the Court below does severe damage both to *Franks v Delaware*, *supra*, and to the clear mandate of this Court that determinations of probable cause are to be left to the reviewing eye of a detached and neutral magistrate. *Aguilar v Texas*, *supra; Spinnelli v United States*, 393 US 410 (1969).

Justice Goldberg, writing for the Court in *Aguilar* expressed this long-standing principle in no uncertain terms.

> The inferences from the facts which lead to the complaint '[m]ust be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. The purpose of the complaint, then, is to enable the appropriate magistrate. . . to determine whether the 'probable cause' required to support a warrant exists." *Aguilar*, *supra* at 112-113.

The import of this language cannot be overstated. Agent Powell's choice of the word "observed" can have but one clear meaning: 'I saw'. It is the same as if he stood up and said 'I am here proclaiming that based upon my own observations,

the statements contained in this affidavit are true'. Unfortunately, such was not the case.

The distinction between the credibility given to the declarations of law enforcement officers based upon their observations and those made pursuant to information indirectly gained, forms the basis of the holdings of both *Aguilar*, *supra* and *Spinnelli*, *supra*. The indisputable lesson of those cases is that if the statement made in an affidavit is not made based upon personal knowledge, then a recital of the circumstances surrounding receipt of that information must be provided in the affidavit. While Petitioners acknowledge that an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v United States*, 362 US 257 (1960) the magistrate must be informed of the circumstances surrounding the officer's belief. Otherwise the veracity and/or reliability of inferences drawn from the facts which lead to the issuance of the warrant will not be drawn by the magistrate but will instead be drawn by the affiant himself, an individual often engaged in the competitive enterprise of ferreting out crime. *Aguilar*, *supra* at 115. Were that allowed to occur, the magistrate would be reduced to a mere rubber stamp for law enforcement officials. Such thinking clearly runs afoul of both *Aguilar* and *Spinnelli*.

Petitioners are not unmindful of this Court's recent decision in *Illinois v Gates*, ____US____ (June 8, 1983). There the Court set a new standard for determining the constitutional sufficiency of search warrant affidavits. While agreeing that the 'totality of the circumstances' test there articulated is a sound approach to determination of search warrant disputes under ordinary circumstances, Petitioners contend the case should not be viewed as a jurisprudential lifeguard lower courts can call upon in order to resuscitate and save plainly false affidavits. This is, however, precisely the manner in which the court below has applied the case. It would be odd indeed if this

Court intended *Gates* to stand as authority sanctioning the kind of reckless, if not fraudulent practices exhibited herein.

It must be remembered Agent Powell is a veteran DEA agent of over 12 years. It is preposterous to believe that with his vast experience he is unaware of the crucial importance of substantiating to a magistrate the circumstances surrounding conclusions drawn based upon inferences. Whether he misrepresented what he actually "observed" in an attempt to cut corners, to save time, or because he could not substantiate the information is not the crucial consideration here. What is significant is that by his misrepresentation he took from the magistrate the constitutionally mandated responsibility for determining the reliability of the statements contained in the affidavit. Although Petitioners will not go so far as to affirmatively declare Agent Powell's actions were intentional, for a trained officer with his experience, such conduct must be viewed at the very least as reckless. Therefore, under this Court's holding in *Franks*, *supra*, the misrepresented portions of the affidavit must be excised and, if upon re-examination probable cause is found lacking, the fruits of the search must be suppressed.

Determination of this issue will well serve the cause of justice by effectively placing law enforcement personnel on notice that holdings of this Court are not to be cavalierally disregarded. *Franks v Delaware*, *supra*, *Aguilar v Texas*, *supra*, *Spinnelli v United States*, *supra* and a series of cases preceding them all cry out for vindication. All will be severely undermined should the practices herein recited be left to stand without comment.

III

WHETHER FEDERAL RULE OF CRIMINAL PROCEDURE 48(b) PROVIDES PROCEDURAL SAFEGUARDS BEYOND THOSE ALREADY EMBODIED IN THE FIFTH AND SIXTH AMENDMENTS, AND CAN APPLY TO THE PERIOD OF TIME BETWEEN DISMISSAL OF CHARGES AND REINDICTMENT ON THE SAME CHARGES TWENTY-SEVEN MONTHS SUBSEQUENT TO PETITIONERS' ORIGINAL ARREST.

The first issue addressed by the court below concerned the question of the proper reach of Fed. R. Cr. Proc. 48(b). Chief Judge Lively, writing for the Court ruled that in light of this Court's holding in *United States v MacDonald*, 456 US 1 (1982), Petitioner's assertion of Rule 48(b) as applicable to the entire period following his initial arrest in January 1980, was erroneous in light of the dismissal of those charges shortly thereafter. In so holding, the Court of Appeals seriously undermined protections clearly provided for in the rule and failed to properly apply previous decisions of this Court.

The decision below raises significant questions with respect to the proper parameters of Fed. R. Cr. Proc. 48(b). The rule has received inconsistent and uncertain treatment among various federal courts. Inasmuch as the question here raised has never been directly addressed by this Court and is significant to federal criminal jurisprudence, the issue merits determination so as to provide the guidance necessary for just and proper application of the rule.

Fed. R. Cr. Proc. 48(b) which "has the force of law, authorizes dismissal of an indictment, information or complaint, '[i]f there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant

who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial. . .'" *United States v Marion*, 404 US 307, 319 (1971). The rule applies only after a defendant has been formally accused, either through arrest or by filing an information or indictment. *Marion*, *supra*. It has long been established that the rule encompasses situations in which a constitutional speedy trial violation has been shown, *Pollard v United States*, 352 US 354, 361 fn. 7 (1977).

Petitioners contend, however, the rule does more. The rule was not merely intended to implement constitutionally protected rights. Rather, it is Petitioners' position that Rule 48(b) was designed to provide broader protection than is currently afforded under the Fifth and Sixth Amendments with respect to prosecutorial delays.

The rule codifies the inherent power of a court to dismiss a case for want of prosecution. *United States v Jasper*, 331 F Supp 814, 818 (E.D. Pa. 1971), *vacated* 460 F2d 1224 (3rd Cir. 1972). "The rule has been used both to avoid the unfairness to the defendant of delay, and to further the public interest in the efficient administration of justice. It may be invoked to protect the defendant's interests even though there has been no Sixth Amendment violation." *United States v Starr*, 434 F Supp 214, 216-217 (D.C. 1977), *See*, also, *United States v Fahey*, 514 F2d 1098 (2nd Cir. 1975). As has been stated, Rule 48(b), "means more than simply 'Obey the Sixth Amendment.'" *United States v Mark II Electronics*, 283 F Supp 280, 283 (E.D. La 1968). The rule, "is designed also to protect other compelling public interests — not necessarily of constitutional proportions in the prosecution of the accused of crime without the procrastination of which the process of law is sometimes guilty." *Id*

As Judge Pratt of the Eastern District of Michigan so appropriately declared "the protection it affords is broader than

that of the Sixth Amendment operating *proprio vigore*." *United States v McLemore*, 477 F Supp 1229, 1234 (E.D. Mich. 1978). Thus, as Chief Justice (then Circuit Judge) Burger has written, "rule 48(b) obviously does not grant less rights than the Sixth Amendment. Indeed, it places a stricter requirement of speed on the prosecution and permits dismissal of an indictment even though there has been no constitutional violation." *Mathies v United States*, 374 F2d 312, 314-315 (1967).

To restrict application of Rule 48(b) to situations in which constitutional violations have been evinced would pervert the intent of the rule. Yet this appears to be the position urged by the government and applied by the court below. Application in this manner renders the rule meaningless. If 48(b) is intended to provide no greater protection than Petitioners can expect under an appropriate Due Process claim pursuant to this Court's holding in *United States v Lovasco*, 431 US 783 (1977), or, under an ordinary speedy trial argument implementing the rationale of *Barker v Wingo*, 407 US 514 (1972), then what precisely is the purpose of Fed. R. Cr. Proc. 48(b)? The court below apparently construes it as mere superfluous statutory baggage; empty of substance apart from safeguards already embodied in the Constitution. Such a reading simply cannot be in line with what must have been this Court's intent in promulgating the rule.

If then, as the above cited case law suggests, Rule 48(b) does afford protection broader than that mandated by the Constitution, the Court below was in error in perceiving *United States v Mac Donald*, 456 US 1 (1982) as an absolute bar to dismissal based upon a claimed 48(b) violation.

Notwithstanding the strong dissent urged by four members of this Court, *MacDonald* held the time between dismissal of military charges and subsequent indictment on civilian criminal charges may not be considered in determining whether the delay in bringing defendant to trial violated his

right to a speedy trial under the Sixth Amendment. The holding in *MacDonald* was, however, founded exclusively upon an examination of Sixth Amendment considerations. At no juncture in the opinion did the Court refer to Rule 48(b). It must be remembered that the power of a court to dismiss pursuant to 48(b) exists wholly apart from its power under the Sixth Amendment. The reach of the rule goes beyond protections provided in the Constitution and gives courts greater discretion to dismiss cases based upon prosecutorial foot dragging. This is the clear import of Chief Justice Burger's declaration in *Mathies*, *supra* at 314–315 that, "rule 48(b)...permits dismissal of an indictment even though there is not constitutional violation." Therefore, while Petitioners do not suggest *MacDonald* may be totally ignored, it cannot be said the case effectively bars dismissal under the rule. The court below, however, apparently failed to recognize this. It read *MacDonald* as proscribing considerations of personal and familial prejudice commencing with Petitioner's arrest in January of 1980 because those charges were soon thereafter dismissed and not reinstituted until April of 1982.

Petitioners are not here advancing a Due Process or Speedy Trial claim. If they were, the lower court's decision would be viable. Petitioners assert rights afforded pursuant to Fed. R. Cr. Proc. 48(b); rights which have been held to provide a broader umbrella of protection than either the Due Process or Speedy Trial clauses of the Constitution. *See*, *Mathies v United States*, *supra*; *United States v Salzman*, 417 F Supp 1139 (E.D. N.Y. 1976) and *United States v Judge*, 425 F. Supp 499 (D. Mass. 1976).

Petitioners contend that in light of the expanded reach of the rule, claims of personal and familial hardship resulting from the failure to institute proceedings for 27 months following Petitioner's arrest should have been viewed as relevant to a 48(b) analysis. The court below, however, again relying on

MacDonald, limited the question of prejudice to the narrow confines of that issue as it relates to Petitioners' ability to mount a defense. The court refused to consider the severe personal hardships and anxiety heaped upon Petitioners and their families caused by the 27 month delay between the original arrest in January, 1980 and their ultimate indictment in April of 1982. While application in this manner would be correct were Petitioners merely claiming violation of Due Process rights, the restrictive nature of the inquiry is inadequate under a 48(b) analysis.

This Court in *Moore v Arizona*, 414 US 25, 26-27 (1973) (per curiam) specifically stated, "Prejudice to a defendant caused by a delay in bringing him to trial is *not* confined to the possible prejudice to his defense in those proceedings." While Petitioners are fully aware that *Moore* was strictly a Sixth Amendment, Speedy Trial Clause case, it has since been posited that, "analysis of precedents dealing with Sixth Amendment issues provides illumination which must be considered for an intelligent, correct and prudent application of Rule 48(b)". *McLemore*, *supra* at 1233. Therefore, it would seem precedents relying on Sixth Amendments grounds are instructive for purposes of properly conducting a 48(b) inquiry.

The leading Speedy Trial, Sixth Amendment case is *Barker v Wingo*, 407 US 514 (1972). There the Court articulated a four part balancing test to be applied when Sixth Amendment violations are asserted. One of the four factors to be weighed is prejudice. In discussing that consideration the Court wrote:

> Prejudice, of course should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) *to minimize anxiety and concern of the accused*; (iii) to limited the possibility that the defense will be impaired. (emphasis added) *Barker*, *supra* at 532.

Barker as well as *Moore* would seem to indisputably indicate that prejudice to the ability to present an effective defense is not the only type of prejudice appropriate for consideration in a Rule 48(b) inquiry. Hence, personal prejudice, "though not the same as that caused by death of a witness or loss of evidence . . . is firmly established as important." *United States v Brown*, 520 F2d 1106, 1111 (D.C. Cir. 1975). *See*, also *United States v Dreyer*, 533 F2d 112, 116 (1976); *United States v Judge*, *supra*. Petitioners therefore, contend that at a minimum the court below was in error in not considering their claims of personal hardship.

Petitioners suffered enormous personal hardship, anxiety and indignity for no reason other than the government's inactivity in moving their case toward resolution. Petitioners should not be made to suffer while government prosecutors drag their heels in pursuit of their Constitutional and codified mandate to efficiently process those accused through the criminal justice system. In the present case, the government offered absolutely no explanation to justify the over two year delay before ultimately obtaining a grand jury indictment. Such conduct should not be tolerated by this or any other federal court.

Determination of the issue herein raised will settle an area of significant moment in Federal criminal jurisprudence. It will insure criminal defendants are not victimized by oppressive and damaging prosecutorial practices specifically made unlawful under Fed. R. Crim Proc. 48(b).

CONCLUSION

The exercise of authority exhibited by law enforcement personnel in this case illustrates a flagrant disrespect for Federal statutory enactments and previous decisions of this Court. Arguably fraudulent police practices resulted in the issuance of a search warrant. Blatantly excessive force, with the concommitant destruction of personal property was displayed in the execution of that warrant. The sanctity of a man's home was shattered needlessly.

Petitioner offers fine, precise points of law for review here. However, in light of the intolerable law enforcement practices herein recited, Petitioner points to the words of Mr. Justice Brennan writing in *Miller*, *supra* at 313 as reason for review by this Court.

> We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However, much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness.

The issues herein raised are important ones. They encompass questions significant to the proper application of Federal criminal law as well as the proper effect to be given previous decisions of this Court. Petitioner is not here requesting the guarantee that his, or other defendant's convictions are founded upon perfect prosecutions, only fair ones. Determination by this Court of the issues here raised will be an important step toward achievement of that goal.

APPENDIX A

No. 82-1897
No. 82-1923

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SABATINO CIAMMITTI (No. 82-1897)
ANTONIO CIAMMITTI (No. 82-1923)
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed November 7, 1983

Before: LIVELY, Chief Circuit Judge; JONES, Circuit Judge; and RUBIN*, District Judge.

LIVELY, Chief Circuit Judge, delivered the opinion of the Court, in which RUBIN, District Judge, joined. JONES, Circuit Judge, (pp. 12-16) filed a separate dissenting opinion.

LIVELY, Chief Circuit Judge. These consolidated appeals present three distinct challenges to the defendants' convictions of conspiracy to manufacture methamphetamine. Since neither defendant claims that the evidence was insufficient, the facts will be recited only to the extent required to deal with the issues actually raised.

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* The Honorable Carl Rubin, Chief Judge, U.S. District Court for the Southern District of Ohio, sitting by designation.

I.

On January 18, 1980 the defendants were arrested on a charge of conspiring and attempting to manufacture amphetamine. The arrest warrant was issued on the complaint of Thomas Powell, a special agent of the Drug Enforcement Administration (DEA). When no indictment or information was filed against the defendants within 30 days of their initial appearance on the complaint, the magistrate dismissed the complaint and cancelled the defendants' bonds. This occurred on March 21, 1980. On April 15, 1982 the defendants were jointly indicted on seven counts for drug-related offenses arising out of the same events. One count charged conspiracy to manufacture methamphetamine. The defendants moved for dismissal of the charges because of preindictment delay.

A.

The defendants do not claim a violation of the Sixth Amendment. Nor do they contend that the delay in the present case violated their due process rights under the Fifth Amendment in view of the district court's finding that the delay did not hinder their ability to present a defense. The defendants rely exclusively on Rule 48(b), F.R. Crim. P., which provides:

Rule 48. Dismissal

* * *

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

By its terms Rule 48(b) is discretionary and, according to the Reporter's Notes, reflects the inherent power of courts to dismiss for want of prosecution. The defendants assert that the district court abused its discretion in denying their motion and committed error in refusing to admit tendered evidence of personal hardship caused by the delay. The proffered testimony was that of the defendants' wives that their families suffered anxieties and hardships during the two-year period between arrest and indictment, and that the threat of indictment hung over them "like a sword of Damocles."

The defendants argue that the district court overlooked the fact of their 1980 arrest in holding that Rule 48(b) is inapplicable to pre-indictment delay. They rely on the statement in *United States v Marion*, 404 U.S. 307, 319 (1971), that Rule 48(b) "clearly is limited to post-arrest situations." (Footnote omitted). The defendants maintain that delay should be measured from their arrests on January 18, 1980 and that the "balancing test" prescribed in *Barker v Wingo*, 407 U.S. 514 (1972), should have been applied. *Barker* recognizes four factors which should be considered in determining whether there has been a violation of the Sixth Amendment right to a speedy trial. Prejudice is one of the factors, and in the Sixth Amendment setting prejudice consisting of anxiety and concern is to be considered. The inquiry is not limited to prejudice which interferes with the defendant's ability to mount and present a defense. *Barker*, 407 U.S. at 532.

The government responds that Rule 48(b) does not apply to the period between arrest and indictment where the charges have been dismissed subsequent to arrest. The prompt dismissal of all charges after arrest required that the delay before indictment be tested by due process standards under guidelines established in *Marion* and *United States v Lovasco*, 431 U.S. 783 (1977), the government contends. Under those guidelines, the government argues, dismissal is not required

upon a showing of the type of hardship relied upon by these defendants. Therefore, it was not error to exclude the testimony of the defendants' wives.

B.

Rule 48(b) comes into play when there is unnecessary delay in presenting a charge to a grand jury "against a defendant who has been held to answer to a district court. . . ." In this case we have defendants who were held to answer charges in 1980. However, the charges were not pending during the entire period between their arrest and their indictment. In fact, they were pending only from January 18 until March 21, 1980. None were pending from March 21, 1980 to April 15, 1982. This fact is significant. In *United States v MacDonald*, 456 U.S. 1 (1982), the Supreme Court held that the Sixth Amendment right to a speedy trial does not apply to a period between the dismissal of charges and the institution of new charges:

> Once charges are dismissed, the speedy trial guarantee is no longer applicable. At that point, the formerly accused is, at most, in the same position as any other subject of a criminal investigation. Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life. This is true whether or not charges have been filed and then dismissed. This was true in *Marion*, where the defendants had been subjected to a lengthy investigation which received considerable press attention. But with no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, "a citizen suffers no restraint on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that

> of a defendant who has been arrested and held to answer." *United States v Marion*, 404 U.S., at 321. Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.

Id. at 8-9 (footnotes omitted). Chief Justice Burger summarized the Court's holding by pointing out that once the first set of charges against the defendant were dismissed he "was legally and constitutionally in the same posture as though no charges had been made." *Id* at 10 (footnote omitted).

The defendants contend that *MacDonald* applies only to Sixth Amendment claims and that Rule 48(b) has a broader reach than the constitutional requirement. They point out that various courts have applied the *Barker v Wingo* balancing test to Rule 48(b) cases. The defendants argue that the district court erred in refusing to receive and consider evidence of personal hardships brought about by delay. We note that the cases relied upon by the defendants involved facts which were quite different from those found in the record before us. For example, the defendant in *United States v McLemore*, 447 F. Supp. 1229 (E.D. Mich. 1978), had been in custody for more than a year prior to his indictment. In *United States v Starr*, 434 F. Supp. 214 (D.D.C. 1971), the court found that serious prejudice had been caused to the defendants' ability to defend themselves because two important witnesses had disappeared in the 13 months between arrest and indictment. In this case the defendants were not incarcerated and were not subject to bail requirements; the charges had been dismissed and their bonds cancelled. Under *MacDonald* prejudice of the type which the defendants sought to establish is insufficient to require dismissal. The defendants do not claim unnecessary delay between their indictment and their trial. They focus on

the period between arrest and indictment, most of which need not be considered with respect to their claim of personal hardship because there were no charges pending. The district court did not err in excluding evidence of anxiety and concern which resulted only from the fact that the defendants were under criminal investigation. Like the defendant in *MacDonald,* they were in the same position as if no charges had been made. The defendants concede that they were unable to establish actual prejudice to their ability to defend or intentional delay to gain some tactical advantage or to harass them. *See United States v Marion, supra,* 404 U.S. at 325. Under the circumstances presented in this case it was not an abuse of discretion to deny the motion to dismiss. *Cf. United States v Giacalone,* 477 F.2d 1273 (6th Cir. 1973).

II.

Several DEA agents searched the defendant Antonio Ciammitti's residence on January 18, 1980 and seized drug-related materials and paraphernalia. Both defendants filed a motion to suppress evidence seized during the search, claiming that the search was illegal. The search was conducted pursuant to a warrant issued on the basis of an affidavit by DEA agent Thomas Powell. In paragraph 2 of the affidavit Powell stated that on December 11, 1979 he and another agent "observed" Antonio Ciammitti and another person obtain from a Columbus, Ohio establishment chemicals and laboratory equipment which could be used to manufacture controlled substances. In paragraph 6 Powell stated that he "observed" a person believed to be an employee of the chemical supply firm deliver chemicals and laboratory equipment to Antonio Ciammitti on December 23, 1979. In paragraph 7 of the affidavit Powell stated that on January 14, 1980 he "observed" Antonio and Sabatino Ciammitti load certain chemicals into an automobile

previously seen at the Antonio Ciammitti residence in Riverview, Michigan. The affidavit detailed surveillance of the delivery of the "observed" chemicals and equipment to the Antonio Ciammitti residence in Riverview, Michigan.

The defendants contend here, as they did unsuccessfully in the district court, that Agent Powell did not actually observe any chemicals or equipment; that everything he saw delivered on December 23 or loaded into vehicles on December 11 and January 14 was enclosed in cartons. Thus they argue that the affidavit contained false statements without which no finding of probable cause could have been made by the magistrate. They rely on *Franks v Delaware*, 438 U.S. 154 (1978), where the Supreme Court held that the Fourth Amendment requires a hearing upon the validity of a search warrant where a defendant makes a substantial preliminary showing that the warrant affidavit contains a statement essential to the establishment of probable cause which is false and knowingly and intentionally made, or is made with reckless disregard for its truth.

The district court held that the defendants in the present case had not made a substantial preliminary showing, but nevertheless conducted a hearing on the issue. At the hearing Powell testified that he personally observed the chemicals immediately prior to each delivery and he knew from conversations with the head of the chemical supply firm and from examining invoices that these chemicals were to be delivered to the Ciammittis. He saw some of the chemicals being placed in cartons which resembled those later loaded into the Ciammitti vehicles. The chemicals were in original packages which bore identifying labels. The district court found that the statements in the affidavit were not knowingly and intentionally false, though Powell could have been more precise in stating what he knew.

The district court did not err in denying the motion to suppress on the basis of the warrant affidavit. The entire argument for suppression is based on use of the word "observed." We do not believe Powell sought to mislead the magistrate by making a false statement or that he acted recklessly. A fuller statement of the sources of his information would have been desirable. He used a word in an imprecise manner, but he entertained no doubt that it truthfully conveyed his knowledge — that the defendants did purchase and take delivery from the Columbus firm of the chemicals and equipment described in the warrant and did transport these purchases to the Antonio Ciammitti residence. Powell also stated in the affidavit that he and other agents watching the Ciammitti house had detected odors associated with the production of amphetamine emanating from the house during the night when lights appeared only in the basement and in one upstairs room. The statements in the affidavit clearly satisfied the requirement that statements be "truthful" as defined in *Franks* — "that the information put forth is believed or appropriately accepted by the affiant as true." 438 U.S. at 165.

It must be remembered that the affidavit was prepared shortly after Powell and two other agents detected odors associated with the manufacture of amphetamine near the Ciammitti residence. It was drafted "in the midst and haste of a criminal investigation," *United States v Ventresca*, 380 U.S. 102, 108 (1965), and was not "purely conclusory," stating only the affiant's belief that probable cause existed. *Id.* It sufficiently detailed the facts required for the magistrate to make a determination of probable cause. The Supreme Court has recently reaffirmed its earlier holdings that the validity of search warrants is to be determined on the totality of circumstances surrounding their issuance rather than by applying any set of rigid requirements. *Illinois v Gates*, — U.S. — (June 8, 1983). Viewed in this manner the affidavit and warrant in this case pass muster.

III.

As an additional ground for suppression of evidence the defendants contend that the DEA agents who searched the residence of Antonio Ciammitti violated 18 U.S.C. §3109 in executing the search warrant. Section 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

After conducting an evidentiary hearing on the motion to suppress the district court made the following findings:

> We find that approximately eight DEA agents, accompanied by approximately three Riverview policemen, approached the Ciammitti house at 12:15 a.m. on January 18, 1980. The only light in the house visible from the outside was a light shining through a basement window on the right side of the house. Nora Ciammitti was sitting in the family room, her husband Antonio was not home, and her four children were asleep in their bedrooms. Sabatino Ciammitti was in the basement. Most agents approached the house from the front door, although several were assigned to the back and sides. Agent Powell pounded loudly on the front door, and yelled that they were federal agents with a search warrant who wanted to be admitted. After pounding on the door for approximately 15 to 30 second[s] without receiving a response, agents started to break the door down with a battering ram. At about the same time, agents stationed at the right side of the house heard noise in the basement, broke in the basement window, and pulled their guns on Sabatino Ciammitti whom they saw through the window.

Nora Ciammitti approached the front door after hearing the noise outside. Once the agents with the battering ram had broken a hole through the door, agent Minger was able to see Nora Ciammitti standing inside the door. Ms. Minger told the other agents what she saw and persuaded them to stop battering the door. The agents then identified themselves as federal agents with a search warrant and demanded that Nora Ciammitti open the door. After encountering some difficulty unhooking the latch, she opened the door and admitted the agents. The agents remained at the house for several hours; all agents who entered the house did so through the front door.

The district court found that the agents were unwarranted in believing they had been denied admittance after waiting 15 to 30 seconds and that they should not have attempted to break down the door. However, the court denied the suppression motion upon finding no causal connection between the violation and seizure of the evidence. The district court reasoned that although breaking a hole in the door violated § 3109, Mrs. Ciammitti complied with the demand that she open the door and all the agents entered through the opened door. The defendants rely principally on *Miller v United States*, 357 U.S. 301 (1958), in arguing that suppression should have been granted. However, we find *Miller* distinguishable in several respects. The officers in *Miller* had no warrant and they never expressly demanded admission or stated their purpose. The Court found that when asked, "Who's there?" one officer said "Police" in a low voice. In the present case the district court found that the agents identified themselves, stated their purpose and demanded entry in a loud voice. The district court credited the testimony of Agent Patricia Minger that when, through the hole, she saw Mrs. Ciammitti approaching the door, she advised the other agents that there was a woman inside and they stopped battering the door. The

agents again identified themselves, stated their purpose and demanded that the door be opened. The door was opened, and the agents entered and conducted the search which produced incriminating evidence.

Though the district court found no causal connection between the breaking of the door and the agents' entry into the house, we do not believe this determination was necessary. Given the knowledge they had of the activities in the basement we find that the agents were justified in concluding that their summons was being ignored. Thus, we conclude there was no violation of § 3109. While they waited for a very brief time after the first demand before starting to break the door the agents ceased the battering when they knew someone was answering their summons.

The search in this case was the culmination of several months of investigation and surveillance. The officers had probable cause to believe that the chemicals and equipment were in the residence to be searched. They obtained a warrant, and following entry through the opened door found a complete laboratory for the production of methamphetamine in the basement of the Ciammitti residence. Suppression of this evidence was not required under the facts of this case.

It is somewhat ironic that the dissent faults the majority for mentioning what was actually discovered after the house was entered. The entire thrust of the dissent is that it was unreasonable to expect Nora Ciammitti "or any reasonable woman" with four children sleeping in their bedrooms to have left the family room at 12:15 in the morning and to open the front door within a half minute. Of course this assumes that the officers knew that Mrs. Ciammitti was the only adult on the ground floor of the house, knew that she was in the family room and knew that she had four children in her care sleeping in the bedrooms. In fact, none of these things were known by

the officers when they concluded that their summons was being ignored. This information all came to light after the officers entered the house and could not have been considered in making their decision to break the door.

What the officers did know was that chemicals and equipment for the manufacture of illegal drugs had been taken into the house by *two men*. They also knew that odors associated with the production of these drugs had been detected coming from the basement on previous nights when the basement lights were on. They knew that the basement lights were on when they approached the front door. While demanding entry at the front door Agent Powell heard the agents on the side of the house breaking the window and yelling to someone, "Freeze."

We did not refer to the fact that the officers had probable cause and to the results of the search to raise the implication that the existence of probable cause or the results of the search can justify ignoring § 3109. These facts were recited only to show that the agents in this case had done a careful and thorough bit of police work before moving against the defendants. The entry into the house was the culmination of months of effort. Unlike the officers in *Miller* they had obtained a search warrant. Also, unlike the officers in *Miller* they announced their identity and purpose at least twice in voices that could be heard inside the house. We conclude that they acted reasonably in assuming they had been refused admittance considering all the circumstances.

The judgment of the district court is affirmed.

Judge Jones, dissenting. Although I agree with the majority's excellent disposition of the 48(b) and the *Franks v Delaware*, 438 U.S. 154 (1978) issues, I cannot in good conscience concur in its treatment of the 18 U.S.C. § 3109 violation. § 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, *to execute a search warrant, if, after notice of his authority and purpose he is refused admittance* or when necessary to liberate himself or a person aiding him in the execution of the warrant.

(emphasis added). As the majority makes clear, the district court found that the agents were not warranted in breaking into the house because a "reasonable person" would not think that a delay of 15 to 30 seconds in answering the door at 12:15 in the morning would constitute a denial of admittance. The majority fails to make clear, however, that the district court explicitly found that the officers' actions in this case violated § 3109.

Contrary to this explicit finding and contrary to what I feel is any reasonable reading of the facts of this case, and without challenging the factual elements found by the district court, the majority concludes that "there was no violation of § 3109." The majority observes that the agents waited a "very brief time after the first demand before starting to break the door." This conclusory statement merely glosses over a relevant and critical fact. The agents, in fact, allowed Nora Ciammitti less than one half of one minute at that hour of the night to answer her front door. I am unable to believe that it was reasonable to expect that this or any individual could have, or *would have*, unlocked the front door at 12:15 in the morning to a group of yelling and pounding strangers — and do so within one half of one minute. Certainly no reasonable law enforcement agent should have sensibly expected that a 15 to 30 second delay in

answering the door at that hour constituted a denial of admittance. The district court, from this factual scenario, explicitly found that the agents were unwarranted in believing that they had been denied admittance.

I do not know how it can now be concluded from these same facts that the "agents were justified in concluding that their summons was being ignored." For that reason I cannot join in a holding which sanctions the use of police authority, under these circumstances, to batter a hole through the front door of a private dwelling in the wee hours of the morning. I am precluded from approving this type of law enforcement by my view of the law which mandates a respect for the privacy of an individual in one's own home. The picture drawn by the majority of the events at Nora Ciammitti's home in justification of the physical destruction of private property at 12:15 a.m. is inconsistent with my view of the record. Neither does it square with that of the district court. As the district court found, the agents' were unwarranted in believing that they had been denied admittance, and their breaking and entering of the Ciammitti home violated § 3109.

Facts known to the agents before, or facts discovered by them after the battering of the Ciammitti's door cannot pardon the clearly unlawful police conduct that took place here. The majority excuses the agents' behavior because of the "knowledge they had of the activities in the basement." But I fail to see the relevance of the agents' prior knowledge to their wanton and reckless disregard for private property. Section 3109 does *not* provide that an officer, in executing a warrant, may break into a home if he is refused admittance or *if he has done a careful and thorough bit of prior police work*. The very language of § 3109 assumes that the officer who breaks into a dwelling is doing so to execute a lawfully obtained "search warrant" based upon probable cause. Thus every officer who

violates § 3109 does so with sufficient knowledge of activities in the dwelling to constitute probable cause. To hold, as the majority holds, that because the officers knew of the "activities in the basement" and had "probable cause to believe that the chemicals and equipment were in the residence," they were justified in believing that they had been "refused admittance" is to render § 3109 a complete nullity. I therefore do not agree with the majority's reliance upon the agents' "knowledge" of possible lawless activity to justify their lawless conduct.

Nor can I understand the apparent reliance upon the items discovered *after* the door was broken to sanction the prior unlawful police activity. For instance, the majority concludes its opinion by observing that evidence of illicit activity was indeed found at the searched home:

> They . . . found a complete laboratory for the production of methamphetamine in the basement of the Ciammitti residence. Suppression of this evidence was not required under the facts of this case.

The majority not only suggests that unlawful police conduct can be forgiven by successful crime prevention, it also implies that successful police activity cannot be unlawful. I find no acceptance of or authority for this implication in the holdings of the Supreme Court or of this Court. I recognize that the exclusionary rule, which is perceived as "letting criminals get off with murder," is under serious attack. Yet, whatever feelings many in the nation harbor for the exclusionary rule, that rule *remains* the legal policy of this country, *see Illinois v Gates*, — U.S. — (1983), the legal policy of this Circuit, *see United States v Hatcher*, 680 F.2d 438 (6th Cir. 1982) and the legal policy to be specifically applied in cases where § 3109 has been violated. *See Miller v United States*, 357 U.S. 301 (1958).

Finally, I disagree with the effort to distinguish *Miller* from the case at bar. Such an effort is unnecessary because the parties agree that there are clear factual discrepancies between these cases.

I deem *Miller's* legal import to be entitled to far greater weight than the majority is able to lend. Like the majority, the *Miller* Court was "duly mindful" of the need for "law and order." I note, however that *Miller* went on to conclude:

> insistence on observance by law officers of traditional fair procedure requirements is, from the long point of view, best calculated to contribute to that end.

301 U.S. at 313. Like the majority, the *Miller* Court was tempted to condone an otherwise unlawful search because it was successful. *Miller* withstood that temptation by observing:

> We have had frequent occasion to point out that a search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.

301 U.S. at 312; *Citing United States v Di Re*, 332 U.S. at 595. Like the majority, the *Miller* Court understood the pressures inherent in police activity. I am more comfortable with and impressed by the deeper understanding manifested by the *Miller* court:

> Congress, codifying, a tradition embedded in Anglo-American law, has declared in § 3109 the reverence of the law for the individual's right of privacy in his house.

301 U.S. at 313. Finally, like the majority, the *Miller* Court wished that police conduct would remain lawful and that the judicial system would retain integrity without the aid of sanctions against lawlessness and duplicity — and so do I. Yet, we

know that is not always possible. This is one of those times. Therefore, as *Miller* instructs:

> The evidence seized should have been suppressed.

301 U.S. at 314. In view of *Miller*, § 3109 and the facts of this case, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTONIO V. CIAMMITTI, et al.,
Defendants.

Criminal No.
80 80033

Dated:
August 10, 1983

MEMORANDUM AND ORDER

Defendants Antonio and Sabatino Ciammitti were indicted on April 16, 1982 on charges stemming from their alleged conspiracy to manufacture methamphetamines during 1979 and 1980. The Ciammittis filed a motion to dismiss on May 14, 1982 on the ground that the government's delay in bringing criminal charges against them violated their fifth amendment rights to due process of law. They also contend that dismissal is warranted under FED. R. CR. P. 48(b). We deny the motion.

The Ciammittis were initially arrested on January 18, 1980. At the time of their arrest, Antonio Ciammitti lived in Riverview, Michigan and Sabatino Ciammitti lived in Arizona. A magistrate dismissed the charges against them on March 21, 1980 for lack of progress. The record indicates that the government conducted little if any investigation in this case from that date until the date of the indictment, 25 months later. In the interim, Richard Hall, a government informant, died on September 7, 1980. Believing that he would not be indicted, Antonio Ciammitti moved his family to Florida in the Fall of 1981. Counsel for the Ciammittis made an offer of proof

regarding the testimony of Suzanne and Nora Ciammitti, the defendants' wives. If allowed to testify, they would have said that their families have undergone great hardships for the past two years as a result of the government's delay in bringing charges against their husbands, and that the threat of an indictment has hung over them "like a Sword of Damocles." The Ciammittis have offered no evidence that the government delayed in bringing the indictment for the purpose of gaining a tactical advantage.

United States v Lovasco, 431 U.S. 783 (1977), sets forth the standards by which a court is to judge whether pre-indictment delay violates a defendant's due process rights and thus mandates dismissal of the indictment. In order to establish a violation, a defendant must demonstrate: 1) that he has suffered "substantial" prejudice to the conduct of his defense as a result of the delay; and 2) that the government's delay was unjustified. *Id.* at 790, 796. We find that the Ciammittis have not demonstrated that they have suffered substantial prejudice to the conduct of their defense as a result of the pre-indictment delay in this case. Thus, we need not consider whether the government's delay was justified. We do not doubt that the Ciammittis and their families have endured great anxieties during the past two years while waiting to discover whether the government would bring criminal charges against them. However, we do not see how those hardships have compromised the Ciammittis' ability to mount a defense. The Due Process Clause provides citizens with procedural rights to a fair trial; it does not imbue citizens with substantive rights to be free from pre-indictment hardships. In the absence of any evidence that the hardships endured by the Ciammittis have compromised the defendants' ability to mount a defense, we do not believe that evidence of such hardship is relevant to this motion to dismiss. *See United States v Marion* 404 U.S. 307, 325-326 (1971).

The Ciammittis also contend that their defense has been prejudiced by the death of Richard Hall on September 7, 1980. Hall headed the chemical supply company in Columbus, Ohio from which the Ciammittis are alleged to have purchased chemicals and equipment used in the manufacture of methamphetamines. The Ciammittis contend that if Hall had lived to testify at trial, he would have stated that the Ciammittis told him that they were experimenting with drugs for the purpose of writing a book on the subject. The Ciammittis contend that such testimony would support their anticipated defense in this case: that they lacked the necessary criminal intent to violate the pertinent statutes. After listening to the testimony of Thomas Powell, an agent with the Drug Enforcement Administration (DEA), we think it clear that Hall's death was far more prejudicial to the government that it was to the Ciammittis. Powell indicated that Hall was instrumental in supplying information to the DEA concerning defendants' activities. We find that if Hall were alive to testify at trial, he most likely would have testified that defendants purchased large quantities of chemicals and equipment from him and sought information regarding techniques for the manufacture of methamphetamines. The inability of the government to call Hall to so testify can only operate to defendants' advantage.

Furthermore, the Ciammittis do not contend that Hall possessed any direct knowledge of any exculpatory evidence. Rather, they contend that Hall could have testified to certain conversations which shed light on the Ciammittis' state of mind. While such testimony might have been helpful to the Ciammittis, they cannot seriously contend that Hall was the only source of testimony concerning their own states of mind. For example, the defendants themselves are free to testify at trial concerning their own states of mind. Thus, we find that the Ciammittis did not suffer substantial prejudice to the conduct of their defense as a result of Hall's death.

The Ciammittis recognize that the sixth amendment's Speedy Trial Clause is not relevant to this case, since the delay to which they object is not post-indictment delay. *See United States v MacDonald*, ____U.S. ____, 50 U.S.L.W. 4347 (March 31, 1982). They argue, however, that FED. R. CR. P. 48(b) has a broader scope than the Speedy Trial Clause and mandates dismissal under the facts of this case. We disagree. Rule 48(b) simply is not applicable to claims of pre-indictment delay. *United States v Marion*, *supra* at 319.

NOW, THEREFORE, IT IS ORDERED that defendants Antonio and Sabatino Ciammitti's motion to dismiss be and the same hereby is DENIED.

/s/ ROBERT E. DEMASCIO
Robert E. DeMascio
United States District Judge

Dated: August 10, 1982

PURSUANT TO RULE [ ] P,
COPIES HAVE BEEN MAILED
TO THE FOLLOWING:
Richard M. Lustig, Esq.
-5- Neil Fink, Esq.
Thomas A. Ziolkowski, AUSA
Alan Gershel, AUSA
ON AUGUST 10, 1982.

/s/ JANET ENGLISH
DEPUTY COURT CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTONIO V. CIAMMITTI, et al.,
Defendants.

Criminal No.
80 80033

Dated:
August 10, 1983

MEMORANDUM AND ORDER

Agents from the Drug Enforcement Administration (DEA) conducted a search of defendant Antonio Ciammitti's house in Riverview, Michigan, on January 18, 1980. Defendants Antonio and Sabatino Ciammitti filed a motion on May 14, 1982 to suppress evidence obtained during the search on the ground that the search was conducted in an unlawful manner. For the reasons stated herein, we deny the motion.

The Ciammittis raise four arguments in support of their motion: 1) the DEA conducted an illegal "beeper" search on or after December 11, 1979, and the evidence seized on January 18, 1980 must be suppressed as the fruit of that beeper search; 2) DEA agent Thomas Powell deliberately falsified statements in his warrant affidavit, and a search warrant would not have been issued if those statements had not been included in the affidavit; 3) the DEA violated federal law by conducting a nighttime search of the house without obtaining specific authorization for a nighttime search; and 4) the search was illegal because DEA agents improperly entered the house through the use of force. We consider each of these four arguments in that order.

The DEA agents witnessed defendants Antonio Ciammitti and Bobby Ray Wilhite purchase chemical supplies in Columbus, Ohio on December 11, 1979. Implanted in one of the boxes of supplies was a "beeper" which could emit an electronic signal. The DEA agents traveling in three separate cars, followed defendants' Ford Bronco back to Antonio Ciammitti's house in Riverview, Michigan. We will find that at least one of the agents monitored the beeper during that trip. Since a court order for monitoring the beeper was not obtained until December 13, 1979, the DEA agents' monitoring activities violated defendants' fourth amendment rights. *United States v Bailey*, 628 F.2d 938 (6th Cir. 1980). However, we find that there was no connection between the "beeper" search and the evidence seized during the January 19, 1980 search and thus that suppression of that evidence is unwarranted. The only information which the beeper might have provided to the DEA was the location of Antonio Ciammitti's house in Riverview. However, that information was easily obtainable from other sources. We note that defendants drove the Ford Bronco directly from Columbus to the Riverview house, with only one brief stop. The DEA agents followed the Bronco in three cars during the trip. We find that the DEA agents would have had no difficulty following the Bronco to Riverview and discovering the location of the house even if the beeper had not been monitored. Furthermore, the agents had long been aware that large quantities of chemicals were being purchased in Columbus by the operators of Pipers Fine Food restaurant. Had agents not been able to follow the Bronco on December 11, 1979, they would soon have discovered that the restaurant was operated by Antonio Ciammitti and that he lived in Riverview. Thus, the beeper search produced no evidence which led to the procurement of a search warrant for the Riverview house and which could not have been obtained independently. The agents' monitoring activities cannot be the basis for suppressing any evidence.

We find no merit in the Ciammittis' argument that agent Powell deliberately falsified his warrant affidavit. Powell testified[1] that he personally inspected chemicals and equipment about to be delivered to defendants on December 11 and 23, 1979, and that on January 14, 1980 he saw through the window of a van packages containing bottles which were about to be delivered to defendants. Powell's affidavit stated that he saw defendants obtain specified chemicals and equipment on December 11 and 23, and on January 14. Powell admitted during cross-examination that the packages were closed at the time they were delivered to defendants, and thus that he could not see precisely what chemicals were in the packages at the time of delivery. He admitted that he based his statements in his affidavit on his personal observations just prior to each delivery, on his conversations with Richard Hall (who headed the chemical supply firm in Columbus from which defendants purchased chemicals), and on invoices supplied to him by Hall. No doubt, Powell could have been more precise in his affidavit concerning the source of his information. However, we find no evidence that the statements in his affidavit were false in anything more than a technical sense, and we certainly do not believe that there is any evidence that the statements were "knowingly and intentionally" false. In any event, Powell had personal knowledge of evidence which was far more than sufficient to establish probable cause to issue the search warrant. Thus, the alleged insufficiency of

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[1] *Franks v Delaware*, 438 U.S. 154 (1978), held that a defendant challenging the veracity of a warrant affidavit is not even entitled to an evidentiary hearing on the issue unless he first makes a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." Id, at 155–156. Defendants made no such showing. However, we permitted them to cross-examine Powell concerning his affidavit for purposes of a making a record, since Powell was already in court to testify on other matters.

Powell's affidavit cannot be the basis for suppressing any evidence.

The Ciammittis' third argument is that the search was illegal because it was conducted at night without specific authorization for a nighttime search. We note initially that there is substantial evidence that the magistrate who issued the warrant did in fact specifically authorize a nighttime search. However, we need not make a finding on that issue, since we believe that no such authorization was necessary in this case. The statute governing execution of search warrants in drug-related cases is 21 U.S.C. 870, which states:

> A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

The final clause of § 879 is susceptible to several different interpretations. It is possible to interpret § 879 as stating that a warrant may be executed at night only if the magistrate finds probable cause *both* for issuance of the search warrant *and* for execution of the warrant at night. However, the Supreme Court rejected that interpretation in *Gooding v United States*, 416 U.S. 430 (1974). The Court held that once the government has established probable cause for issuance of a search warrant in a drug case, it can be executed at any time, day or night. It is true that the issuing magistrate in *Gooding* had specified that the warrant could be executed at night, but that fact is irrelevant to the holding in *Gooding*. There is no need in a drug case for a magistrate to specify the time of day when the warrant is to be executed, because § 879 (as interpreted by *Gooding*) eliminates the distinction between daytime and nighttime searches in drug cases. A magistrate need only find

that probable cause exists to believe that the articles sought will be present at the time of the proposed search in order to issue the warrant. In this case, the magistrate issued a search warrant on January 17, 1980 and specified that the warrant was to be executed within 72 hours. The DEA complied with that specification; so long as the warrant was executed within the allotted time, the time of day of execution was irrelevant.

The Ciammittis' final and more persuasive argument is that agents entered the Riverview house to execute the warrant in violation of 18 U.S.C. § 3109, which states:

> The officer may break any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance.

We conducted an evidentiary hearing on the claim; Nora (Mrs. Antonio) Ciammitti and several DEA agents testified. The accounts of what occurred at the time of the search varied widely. We cannot fully credit the testimony of either Agent Powell or Mrs. Ciammitti. We find Mrs. Ciammitti's testimony that she had not been in her basement for several weeks prior to the search, that she did not know what Sabatino Ciammitti was doing in the basement at the time of the search, that the burns on her husband's hands came about while he was working on the carburetor of his car, and that she could not detect any strong odors coming from her basement on the night of the search to be incredible. Our disbelief of that testimony leads us to discount somewhat her testimony concerning the manner in which the DEA agents entered her house. We believe that agent Patricia Minger testified truthfully to the best of her recollection regarding the events of January 18, 1980, and our findings of fact are based primarily on her testimony.

We find that approximately eight DEA agents, accompanied by approximately three Riverview policemen, approached the Ciammitti house at 12:15 a.m. on January 18, 1980. The only light in the house visible from the outside was a light shining through a basement window on the right side of the house. Nora Ciammitti was sitting in the family room, her husband Antonio was not home, and her four children were asleep in their bedrooms. Sabatino Ciammitti was in the basement. Most agents approached the house from the front door, although several were assigned to the back and sides. Agent Powell pounded loudly on the front door, and yelled that they were federal agents with a search warrant who wanted to be admitted. After pounding on the door for approximately 15 to 30 seconds without receiving a response, agents started to break the door down with a battering ram. At about the same time, agents stationed at the right side of the house heard noise in the basement, broke in the basement window, and pulled their guns on Sabatino Ciammitti whom they saw through the window.

Nora Ciammitti approached the front door after hearing the noise outside. Once the agents with the battering ram had broken a hole through the door, agent Minger was able to see Nora Ciammitti standing inside the door. Ms. Minger told the other agents what she saw and persuaded them to stop battering the door. The agents then identified themselves as federal agents with a search warrant and demanded that Nora Ciammitti open the door. After encountering some difficulty unhooking the latch, she opened the door and admitted the agents. The agents remained at the house for several hours; all agents who entered the house did so through the front door. The agents arrested Sabatino Ciammitti in the basement, where they found a laboratory being used for the manufacture of methamphetamines. While inside the house, agents used a crowbar to open the unlocked door from the kitchen to the garage, breaking the lock. Two agents may have urinated on

the floor in the bathroom, and the agents may have been unnecessarily destructive in their search of the basement. The three oldest children (who were awakened by the pounding on the front door) and Nora Ciammitti were confined to the family room throughout the search.

Section 3109 provides that federal officers may not enter a dwelling without permission to execute a search warrant unless, after announcing their authority and purpose, they are refused admittance. Evidence obtained during a search by those who enter a dwelling in violation of § 3109 may not be admitted at a subsequent trial. *Miller v United States*, 357 U.S. 301 (1958). The government contends that the agents were justified in attempting to break down the front door, because the occupants' failure to answer the door was tantamount to a refusal to admit.[2]

No hard and fast rule has been established for determining how long an officer must wait before deciding that he has been refused admittance. Rather, refusal is to be implied when, in light of all the circumstances, a "reasonable man" would be convinced that he had been refused permission to enter. *United States v Bustamante-Gomez*, 488 F.2d 4 (9th Cir. 1973). The agents in this case waited 15 to 30 seconds before attempting to break the front door. Given that when the agents arrived at the house at 12:15 a.m. no lights were on upstairs, we believe that the agents were unwarranted in believing that they had

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[2] We reject the government's alternative contention: that "exigent circumstances" eliminated the need for the agents to comply with 18 U.S.C. § 3109. The agents could not reasonably have believed that anyone would escape from the house, since it was surrounded by agents. Nor could they have believed that an entire laboratory would be destroyed while agents waited for someone to answer the door; nor was there reasonable cause to believe that any evidence was being destroyed.

been denied admittance. They should not have attempted to break down the front door.

However, the agents did not succeed in breaking into the house. They stopped hitting the door when Nora Ciammitti arrived. They announced their authority and purpose to her, and demanded that she open the door. She complied, and no agents entered the house except through the opened door. It was only after she admitted the agents that any evidence was seized. Thus, although the agents initially violated § 3109 by breaking a hole in the front door and by smashing a side window, the seizure of evidence was a result of a lawful entrance of the house. A violation of § 3109 does not require suppression of evidence unless there was a causal connection between the violation and the obtaining of the evidence. *United States v Glassel*, 488 F.2d 143, 146 (9th Cir. 1973), *cert. denied* 416 U.S. 941 (1974). There was no such causal connection here; the violation of § 3109 thus cannot be the basis of suppressing any evidence.

We do not condone the conduct of the agents involved in executing the search warrant. They not only broke in a window and a door without waiting to be admitted into the house, but also may have been unnecessarily destructive after entering the house. If any occupants of the house believe that their constitutional rights were violated during the search, they may seek redress in a civil action. *See Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, we do not believe that under the facts of this case suppression of the highly relevant and highly incriminating evidence obtained in the search is a proper remedy for any improprieties occurring during the search. We note that the search was conducted pursuant to a valid search warrant and that entry into the house to execute the warrant was effectuated in a legal manner.

NOW, THEREFORE, IT IS ORDERED that defendant Antonio and Sabatino Ciammitti's motion to suppress evidence be and the same hereby is DENIED.

/s/ ROBERT E. DEMASCIO

Robert E. DeMascio
United States District Judge

Dated: August 10, 1982

APPENDIX C

Petitioners attacked the veracity of portions of paragraphs two, six and seven of the search warrant used to search Antonio Ciammitti's home on January 18, 1980. Those paragraphs provided as follows:

2. On September 11, 1979, the affiant and Special Agent William Dodson, also of the Drug Enforcement Administration (DEA), observed Antonio Ciammitti and Bobby Wilhite obtain from the Buckeye Scientific Company in Columbus, Ohio, certain chemicals and laboratory equipment including sulfuric acid, magnesium metal turnings, hydrochloric acid, hydrogen chloride gas, nitrogen gas, ether, a sepratory funnel, three neck flasks, a Buchner funnel, and a condenser. These chemicals and laboratory equipment can be used in the manufacture of controlled substances. The affiant and Special Agent Dodson followed Antonio Ciammitti and Wilhite as they transported these chemicals and equipment from the Buckeye Scientific Co. in Columbus, Ohio, to the above described address in Riverview, Michigan, in the Eastern District of Michigan.

6. On December 23, 1979, an individual believed to be an employee of Buckeye Scientific Company, was observed by the affiant that he delivered to Antonio Ciammitti and Bobby Wilhite at Piper's Fine Food in Woodhaven, Michigan, certain chemicals and laboratory equipment including aceticanhydride, ether, ethyl acetate, two Buchner funnels, a filtering flask, and check valves. These chemicals and laboratory equipment can be used in the manufacture of controlled substances. Also on December 23, 1979, the affiant observed Ciammitti and Wilhite transport these chemicals to the above described address in Riverview, Michigan.

7. On January 14, 1980, the affiant observed Antonio Ciammitti and his brother, Sabatino Ciammitti, meet an individual believed to be an employee of Buckeye Scientific Company in Columbus, Ohio. They were driving an Eldorado Cadillac, Michigan License No. MPS 137 registered to Dick Genthe Chevrolet. The affiant has observed this automobile parked in the garage at the above-described address in Riverview, Michigan. On January 14, 1979, at approximately 9:00 p.m. the affiant observed Antonio and Sabatino Ciammitti load the following chemicals into the Cadillac; formamide, phenylacetone, and aceticanhydride. These chemicals are essential precursor chemicals for the making of amphetamine, a Schedule II controlled substance.

Office - Supreme Court, U.S.
FILED
APR 13 1984
ALEXANDER L. STEVAS

No. 83-1129

In the Supreme Court of the United States

OCTOBER TERM, 1983

ANTONIO CIAMMITTI AND SABATINO CIAMMITTI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

Page

Cases:

Franks v. *Delaware*, 438 U.S. 154 5

Illinois v. *Gates*, No. 81-430 (June 8, 1983) 4

Miller v. *United States*, 357 U.S. 301 3

United States v. *Lovasco*, 431 U.S. 783 5

United States v. *MacDonald*, 456 U.S. 1 5

United States v. *Ventresca*, 380 U.S. 102 4

Statutes and rule:

18 U.S.C. 3109 ..... 1, 3, 4

21 U.S.C. 846 1

Fed. R. Crim. P. 48(b) 5

In the Supreme Court of the United States

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ANTONIO CIAMMITTI AND SABATINO CIAMMITTI,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that evidence should have been suppressed because government agents violated 18 U.S.C. 3109 in executing a search warrant; that the warrant authorizing the search was tainted by false information; and that the indictment should have been dismissed because of pre-indictment delay.

1. Following a bench trial on stipulated facts in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. 846. Petitioner Antonio Ciammitti was sentenced to two years' imprisonment. Petitioner Sabatino Ciammitti was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1a-17a; 720 F.2d 927).

Prior to trial, petitioners moved to suppress evidence seized during a warrant-authorized search at the home of petitioner Antonio Ciammitti in Riverview, Michigan. In an affidavit supporting the issuance of the warrant, Drug Enforcement Administration Agent Thomas Powell alleged that, on several dates in December 1979, he observed petitioner Antonio Ciammitti obtain from a Columbus, Ohio establishment chemicals and laboratory equipment that could be used to manufacture methamphetamine. The affidavit further alleged that on January 14, 1980, the agent observed both petitioners load chemicals into an automobile and transport those chemicals to Antonio Ciammitti's residence. On the basis of this and other information, a magistrate issued a search warrant for that residence. Pet. App. 6a-7a.

The agents arrived at the residence to execute the warrant at 12:15 a.m. on January 18, 1980. As the agents approached the house, they observed light coming from a basement window. The agents knew that odors associated with the manufacture of methamphetamine had been detected coming from the basement on previous nights when the lights were on. Several agents stationed themselves outside the basement window, while other agents, led by Agent Powell, approached the front door, knocked loudly, and announced their presence and purpose. About 15 to 30 seconds later the first group of agents broke the basement window and pulled their guns on petitioner Sabatino Ciammitti, whom they saw through the window. At the same time, the agents under Agent Powell's supervision began to break down the front door with a battering ram. Once the agents with the battering ram made a hole in the front door, they saw Antonio Ciammitti's wife standing inside the house. After the agents again identified themselves and demanded entry, Mrs. Ciammitti opened the door. The search of the basement uncovered a complete laboratory capable of producing methamphetamine.

2. Petitioners contend (Pet. 6-12) that when the agents attempted to break down the door they were not justified in believing that they had been refused entry, and that their conduct therefore violated 18 U.S.C. 3109. The court of appeals correctly rejected this fact-bound contention.

In concluding that the agents "acted reasonably in assuming they had been refused admittance" (Pet. App. 12a), the court of appeals considered "all the circumstances," including the following: (1) the agents knew that chemicals and equipment used to manufacture illegal drugs had been taken into the house by two men; (2) odors associated with the manufacture of illegal drugs had emanated from the basement on previous nights when the basements lights were on; (3) the basement lights were on when the agents approached the house; and (4) while demanding entry at the front door Agent Powell heard the other group of agents break the basement window and yell, "Freeze." These facts support the court of appeals' conclusion that the agents' actions were in compliance with Section 3109.[1] The question whether, in the particular circumstances of this case, the agents waited a proper length of time before attempting a forcible entry is not of sufficient general importance to warrant this Court's review.[2]

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[1]Petitioners' reliance on *Miller* v. *United States*, 357 U.S. 301 (1958), is misplaced. As the court below pointed out (Pet. App. 10a-11a), *Miller* involved starkly different facts—in that case the officers did not have a warrant and never expressly demanded admission or stated their purpose.

[2]In any event, as the district court held in denying petitioners' suppression motion (Pet. App. 12b), the evidence seized inside the house pursuant to the search warrant was not the fruit of any arguable violation of Section 3109's standards. At most, the agents' actions resulted in unnecessary property damage; their actions did not invade any legitimate privacy interest that the occupants of the house might have enjoyed. This "fruits" argument is similar to one we have made in our petition for a writ of certiorari in *United States* v. *Moreno*,

3. Petitioners contend (Pet. 13-17) that the evidence seized in the search of the house should be suppressed because of allegedly deliberate factual misrepresentations in the search warrant affidavit. This contention is insubstantial and was correctly rejected by both courts below (Pet. App. 6a-8a, 7b-8b).

Petitioners claim that Agent Powell's allegations that he "observed" petitioners receiving certain chemicals was a deliberate misrepresentation because the agent saw only that petitioners received cartons from the chemical company. As the court of appeals pointed out (Pet. App. 7a), however, Agent Powell testified at the suppression hearing

> that he personally observed the chemicals immediately prior to each delivery and he knew from conversations with the head of the chemical supply firm and from examining invoices that these chemicals were to be delivered to the [petitioners]. He saw some of the chemicals being placed in cartons which resembled those later loaded into the [petitioners'] vehicles. The chemicals were in original packages which bore identifying labels.

Petitioners' challenge to the agent's use of the word "observed" in these circumstances is preciseley the kind of hypertechnical reading of search warrant affidavits that this Court has consistently rejected. See *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 20; *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965). Certainly, there is no basis for concluding that the agent's failure to explain in the affidavit the underlying basis for his knowledge that the

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No. 83-396 (filed Sept. 8, 1983). Because the court of appeals in this case correctly concluded that the agents complied with Section 3109, there is no need for this Court to hold this case pending the disposition of *Moreno*.

cartons contained particular chemicals constituted a deliberate falsehood such as that contemplated in *Franks* v. *Delaware*, 438 U.S. 154 (1978).

4. Petitioners contend (Pet. 18-23) that a two-year delay between the date the initial complaint against them was dismissed and the date of their indictment warrants dismissal of the indictment pursuant to Fed. R. Crim. P. 48(b). Petitioners do not assert any due process claim, nor could they, since they have never contended that the delay adversely affected their ability to defend themselves. See *United States* v. *Lovasco*, 431 U.S. 783, 789-790 (1977). Similarly, because no charges were pending against petitioners during the two-year period in question, they are not entitled to dismissal of the indictment on speedy trial grounds. See *United States* v. *MacDonald*, 456 U.S. 1 (1982).

Petitioners nevertheless argue that the district court should have heard evidence regarding the personal hardships that they experienced as a result of the delay and should have dismissed the indictment on that basis pursuant to Rule 48(b), which petitioners assert is broader in scope than the constitutional due process and speedy trial guarantees. Petitioners' argument is entirely without merit. We note that, other than alleging personal hardship, petitioners are unable to point to any aggravating circumstance, such as incarceration, loss of a witness, or government misconduct, that would warrant dismissal on account of the delay. Furthermore, assuming the district court would have power under Rule 48(b) to dismiss an indictment with prejudice in extraordinary circumstances, the Rule surely provides broad discretion for the district court in deciding not to order dismissal. In the absence of any aggravating circumstance calling the basic fairness of the revived charge into question, there is simply no basis for finding that the district court abused its discretion in denying petitioners' motion to dismiss.

It is therefore respectfully submitted that the petiton for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

DOJ-1984-04